

UNCERTAIN FUTURE: HOW CONDITIONAL RIGHTS CAN IMPACT THE PRIOR APPROPRIATION SYSTEM

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This presentation examines the unique aspects of conditional rights within Colorado and how they may impact the future of the Colorado River Basin



WHAT ARE CONDITIONAL WATER RIGHTS?



Considered an unperfected water right



Water court has **granted** the applicant the right to use water, but that water **has not** been applied to the beneficial use stated in the application



Priority is based on the date the appropriator applied and was granted the right to use water rather than when applied to a beneficial use



HOW DO WATER USERS OBTAIN A CONDITIONAL WATER RIGHT?

- Apply to water court for right to use
 - Must prove a need for the water, that there are committed users for the water, and the uses to which the water will be dedicated
- Must show the project for which water is needed will be completed with reasonable diligence
- User must demonstrate they "can" and "will" complete the application of water to a beneficial use
- Users subject to anti-speculation doctrine

WHAT MAKES CONDITIONAL WATER RIGHTS UNIQUE IN COLORADO?



Treatment as **property** that can be sold, transferred, or changed



Unlike most other prior appropriation states, Colorado does not have a time limit on the time to complete construction, or apply water to a beneficial use



Diligence requirements



Courts are hesitant to abandon



WHO HOLDS CONDITIONAL RIGHTS?

- Held by a variety of users and industries but the largest concentrated holdings with the potential to affect the Colorado River Basin are seen in companies attempting to develop oil shale here in the western slope
- Oil shale holding can result in line jumping
- Development of oil shale would require massive amounts of energy and water

CONDITIONAL RIGHTS IN PRACTICE

- *Municipal Subdistrict, N. Colo. Water Conservancy Dist. v. Chevron Oil Shale Co.*, 896 p.2d 918
- *Municipal Subdistrict v. OXY USA, Inc.*, 990 p.2d 701
- *Vermillion Ranch Ltd. P'ship. v. Raftopoulos Bros.*, 2013 Co 41.



IMPACTS ON PRIOR APPROPRIATION

- **Results in line-jumping** – those who have been receiving water for decades may be curtailed by conditional rights
- Potential to reduce return flows
- Potential to impact Colorado's obligations under the Colorado river compact by reducing the amount of water in priority for other uses
- **Creates uncertainty for users** – do not know when or if their right may ever be no longer in priority

POTENTIAL SOLUTIONS TO CURTAIL IMPACTS

Reform the Due Diligence Standards

1. Require concrete evidence of plans, construction timelines, permits, and costs required to apply water to a beneficial use
2. Presumption of abandonment in diligence proceeding
3. Time limits on application to a beneficial use

Legislative action

- Declare that conditional rights are not vested property until applied to a beneficial use
- Create exemptions for agricultural community

SOURCES

- COLO. REV. STAT. § 37-92-301
- COLO. REV. STAT. § 37-92-103(3)(A).
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- COLO. REV. STAT. § 37-92-301(4)(C).
- *MUNICIPAL SUBDISTRICT, N. COLO. WATER CONSERVANCY DIST. V. CHEVRON OIL SHALE CO.*, 986 P.2D 918, 920.
- *MUNICIPAL SUBDISTRICT V. OXY USA, INC.*, 990 P.2D 701, 712.
- *VERMILLION RANCH LTD. P'SHIP. V. RAFTOPOULOS BROS.*, 2013 CO 41.
- *DALLAS CREEK WATER CO., V. HUEY*, 933 P.2D 27, 36 (COLO. 1997).
- *COLORADO RIVER WATER CONSERVATION DIST., V. VIDLER TUNNEL WATER CO.*, 594 P.2D 566, 568 (COLO. 1979).
- LAWRENCE J. MACDONNELL, WATER ON THE ROCKS: OIL SHALE WATER RIGHTS IN COLORADO, WESTERN RESOURCE ADVOCATES, (2009), AT 50-54, [HTTPS://WESTERNRESOURCEADVOCATES.ORG/WP-CONTENT/UPLOADS/DLM_UPLOADS/2015/05/WOTRREPORT.PDF](https://westernresourceadvocates.org/wp-content/uploads/dlm_uploads/2015/05/WOTRREPORT.PDF)
- GREGORY J. HOBBS, COLORADO WATER LAW: AN HISTORICAL OVERVIEW, 1 U. DENV. WATER L. REV. 1 (1997).
- CHARLES PODOLAK & MARTIN DOYLE, *CONDITIONAL WATER RIGHTS IN THE WESTERN UNITED STATES: INTRODUCING UNCERTAINTY TO PRIOR APPROPRIATION*, JOURNAL OF THE AMERICAN WATER RESOURCES ASSOCIATION, APRIL 30, 2014 AT 14.